

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>LARRY BROOKS</b>	)	
Claimant	)	
V.	)	CS-00-0153-686
	)	AP-00-0451-082
<b>GOODYEAR TIRE &amp; RUBBER CO.</b>	)	
Self-Insured Respondent	)	

**ORDER**

The self-insured respondent, Goodyear Tire & Rubber Company (Goodyear), through John Jurcyk, appealed Administrative Law Judge David Bogdan's Post Award Order dated May 15, 2020. Roger Fincher appeared for the claimant, Larry Brooks (Brooks). This is a post-award proceeding for medical benefits. The case was placed on the summary docket for disposition without oral argument.

Due to a conflict, Board Member Rebecca Sanders recused herself from this appeal. Mark Kolich has been appointed as a Board Member Pro Tem in this case.

**RECORD AND STIPULATIONS**

The Board considered the post-award record and adopted the Award's stipulations.

**ISSUE**

This is the second time the Board has reviewed this matter. On April 11, 2019, in addition to awarding Brooks permanent partial disability based on a work disability, the judge awarded Brooks future medical treatment in the form of pain management and medication management. The Board, in an Order dated October 17, 2019, modified the ruling to award future medical treatment without qualification or limitation.

On March 5, 2020, Brooks filed an Application for Post-Award Medical, Termination or Modification of Medical Benefits. A post-award hearing was held on May 12, 2020. The judge concluded Brooks' back and leg symptoms were related to his original cervical injury. The judge ordered medical treatment for Brooks' back and legs, including pain management and injections.

Goodyear argues Brooks' request for medical treatment for his back and leg symptoms should be denied. Goodyear contends there is no medical evidence to indicate Brooks' symptoms are causally related to or the natural, direct and probable consequence of his original cervical injury. Brooks maintains the Order should be affirmed.

Therefore, the issue is whether Brooks is entitled to medical treatment for his back and leg symptoms.

**FINDINGS OF FACT**

The Board incorporates by reference the findings of fact set forth in its Order dated October 17, 2019. Some of those facts are repeated for the benefit of the reader.

Brooks, currently 55 years old, worked for Goodyear as a tire builder. On March 21, 2016, he sustained a compensable cervical injury and was eventually referred to Alexander Bailey, M.D., a board-certified orthopedic spine surgeon, for treatment.

On June 28, 2016, Brooks began treating with Dr. Bailey. Brooks complained of thoracic and low back pain, bilateral leg pain, numbness and tingling, and difficulty walking. The doctor ordered an MRI which showed a rather large disc herniation at C5-6 and C6-7, with neurologic impingement and cord impingement. After reviewing MRI scans, Dr. Bailey stated:

The patient's unusual distribution of pain, the questionable gait, his multifocal pain behavior of neck, mid back, low back and extremities are reasonably indicated associated with the MRI findings of the cervical spine. This patient has significant neurologic impingement at 5-6 and 6-7 to a surgical level. This patient needs to be acutely evaluated, acutely managed through surgical services.

In this patient's case, I think his presentation is actually far more realistic given his findings on his MRI scan cervical spine. Cervical stenosis of this degree can in fact result in a variety of shifting nature symptomatology, potentially bizarre symptomatology that can change and traverse time. I would indicate there is reasonable evidence of an abnormality that needs to be treated.<sup>1</sup>

In July 2016, Dr. Bailey performed a cervical corpectomy and grafting, and anterior plate fixation from C5 to C7. In a January 5, 2017 letter, Dr. Bailey stated:

This patient has permanent cord issues and damage. Four extremity abnormalities is expected but fortunately MRI scan shows no residual or current compression on the cervical spinal cord. I cannot control neurologic recovery from this patient's cord injury or problems . . . . There was no high-grade stenosis in the thoracic or lumbar spine. Cervical cord issues can result in four extremity abnormalities and cervical, thoracic and lumbar spine pain . . . . This is not a standard cervical spinal injury. This is not a standard anterior cervical decompression and fusion. This patient had near paraplegia or quadriplegia from his cervical spinal issues. Had this interventional treatment been delayed further we may be dealing with a far greater neurologic issue than what Mr. Brooks is currently presenting with.

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<sup>1</sup> Bailey Depo., Ex. 2 at 12.

I still stand by my prevailing factor with available information. There was reasonable evidence of large disc herniations two levels cervical spine with critical neurologic impingement. Thoracic and lumbar spinal causal relationships can be further identified at the next clinical visit that has been requested since 11/01/2016 to follow his MRI scan. I will re-review these issues but I do not believe this patient has a thoracic or lumbar spinal issue that is contributing to his ongoing issues. I will further clarify.

As it relates to work function, this patient has significant limitations. This patient will ultimately require a functional capacity examination but I believe I have been delayed in evaluation and treatment of this patient since 11/01/2016 at the time of a requested MRI scan. I cannot change these factors or turn that clock backwards. The best I can do is move forward from this point in time. I would request the patient follow up after his MRI scan for my personal review. Certainly fortunately the MRI report looks excellent. I will clear any ongoing issues of the cervical spine. I will further clear whether there is any issues with the patient's thoracic or lumbar spine that need to be addressed or opined upon. Otherwise, we are dealing with a neurologic issue that may not have a fully reversible course.<sup>2</sup>

When Dr. Bailey released Brooks from treatment on January 17, 2017, Brooks continued to complain of ongoing symptoms that spread from his neck, mid-back to low back and legs. Dr. Bailey's final assessment was: (1) status post cervical corpectomy with ideal postoperative radiographic appearance and (2) generalized pain character and possible sequela of his cervical myelopathy and myelomalacia. The doctor recommended medications on a continuing basis, and possibly long term.

At his attorney's request, Brooks saw Anne Rosenthal, M.D., on March 24, 2017, for an independent medical evaluation. Dr. Rosenthal diagnosed Brooks with: (1) critical cervical spinal stenosis with myelopathy, gait intolerance, and neurologic deficits; (2) massive herniated nucleus pulposus, cervical spine C5-C6; (3) cervical spinal stenosis C5-C6, central, bilateral recess, bilateral neural foramen critical in nature; (4) herniated nucleus pulposus, cervical spine C6-C7; (5) cervical spinal stenosis C6-C7, central, bilateral recess, bilateral neural foramen; (6) extension of herniated nucleus pulposus material behind the vertebral body of C6 outside the range of standard anterior cervical decompression and fusion access; and (7) intractable neck pain, neurologic dysfunction and gait intolerance/myelopathy. The doctor stated, "Please note that he has ongoing myelopathy which is from permanent damage to his cervical spinal cord and is manifested by dysesthetic pain and a gait disorder."<sup>3</sup>

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<sup>2</sup> *Id.*, Ex. 2 at 43-46.

<sup>3</sup> Rosenthal Depo., Ex. 2 at 7.

Dr. Rosenthal assigned Brooks a whole person functional impairment, including a component based on myelopathic gait. Dr. Rosenthal opined Brooks' work-related accident was the prevailing factor for the critical compression of his cervical spinal cord and resultant myelopathy. She noted Brooks would continue to have pain throughout his spine, numbness and tingling in all extremities and a wide-based gait. The doctor believed Brooks would require future medical treatment, including possible hardware removal and surgery.

Brooks currently treats with Zhengyu Hu, M.D. At the post-award hearing, the reports of Dr. Hu dated August 16, 2019 and October 14, 2019, were admitted without objection. Brooks complained of many symptoms involved in his original claim, including severe low back pain, and numbness, tingling and weakness of his legs. In both reports, the doctor referenced his authorization for treatment, per Karen (likely Karen Moenkhoﬀ of Liberty Insurance Corporation/Helmsman Management) was limited to Brooks' cervical condition. Therefore, Dr. Hu focused on Brooks' neck and upper extremities. The doctor told Brooks to get treatment for his back and legs through his primary care physician. Dr. Hu documented "March 5th" (presumably 2019) MRI findings showing moderate right neural foraminal stenosis at the T4-5 level in the thoracic spine and mild degenerative changes without significant central canal or neural foraminal stenosis in the lumbar spine. Based on statements from the attorneys and the judge, Dr. Hu apparently provided no causation opinion regarding Brooks' back and leg symptoms.

In the original proceeding, Brooks testified he had daily neck pain and a burning and tingling sensation from his mid-back to his feet and hands. Brooks testified his leg pain and lower back pain were worse than his neck pain. At the post-award hearing, Brooks denied any low back or leg symptoms, including numbness and tingling and altered gait, predated his work injury. Brooks attributed all of these symptoms to his work injury. He believed Dr. Hu would treat his low back and legs if Goodyear provided authorization. Brooks testified he wanted some form of treatment to ease his back and leg symptoms.

On pages 3-4 of his Order, the judge stated:

Claimant complains of pain, numbness and tingling in his low back and legs as a result of this injury. Dr. Bailey has diagnosed myelomalacia as a cause as a result of the injury. Dr. Rosenthal indicates he has myelopathy from permanent damage to his spinal cord as a result of this injury. While the pain is focused upon the lower back and legs, the cause is the cervical condition.

...

Based upon Claimant's complaints related to his back and legs and their consistency with complaints presented during and after treatment, additional treatment as it relates to the myelopathy or myelomalacia caused by the cervical herniation appears related to the original injury and is compensable.

After considering the medical exhibits, testimony presented and remarks of counsel, it is determined that Claimant's demand for additional medical treatment in the form of treatment including pain management and injections for his back and legs as a result of the cervical injury be approved.

### **PRINCIPLES OF LAW**

Under K.S.A. 44-501b and K.S.A. 44-508: (1) an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment; (2) the claimant has the burden of proof to show his position on an issue is more probably true than not true; and (3) the trier of fact shall consider the whole record. An employer must prove any affirmative defenses.<sup>4</sup>

K.S.A. 44-508 states, in part:

(f)(2) An injury is compensable only if it arises out of and in the course of employment. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Employees are entitled to compensation for secondary injuries which are the natural and probable result of the primary injury.<sup>5</sup> "[A]ll injuries, including secondary injuries, must be caused primarily by the work accident."<sup>6</sup> Under the law in effect from May 15, 2011, forward, secondary injuries are compensable if caused primarily by the original work accident and are the natural and probable consequence of the original injury.<sup>7</sup>

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<sup>4</sup>See *Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 445 P.3d 1183 (2019), *rev. denied* \_\_\_ Kan. \_\_\_, \_\_\_ P.3d \_\_\_ (Feb. 25, 2020).

<sup>5</sup> See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 515-16, 154 P.3d 494 (2007).

<sup>6</sup> *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 951, 379 P.3d 428 (2016).

<sup>7</sup> See *id.*

K.S.A. 44-510k states:

(a) (1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee . . . may make application for a hearing, in such form as the director may require for the furnishing . . . of medical treatment.

. . .

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury . . . .

(4) No post-award benefits shall be ordered, modified or terminated without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551, and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

Finally, the Board is driven by general considerations. Plainly-worded workers compensation statutes should be interpreted literally.<sup>8</sup> Our review of an order is de novo based on the record.<sup>9</sup> De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.<sup>10</sup>

#### **ANALYSIS AND CONCLUSION**

This is not an instance of an original injury leading to a secondary injury. Brooks complained of general back pain, including pain affecting his lumbar and thoracic regions, in addition to leg pain, weakness, numbness and tingling, from the onset of his work injury by accident. Drs. Bailey and Rosenthal attributed Brooks' back and leg symptoms to his compensable neck injury. The Board affirms the judge's decision to award Brooks medical treatment as noted in the Post Award Order.

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<sup>8</sup> See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

<sup>9</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

<sup>10</sup> *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009).

**AWARD**

**WHEREFORE**, the Board affirms the Post Award Order dated May 15, 2020.<sup>11</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2020.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

Electronic copies via OSCAR to:

Roger Fincher

John Jurcyk

Honorable David Bogdan

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<sup>11</sup> Under K.S.A. 44-555c(j), all members of the Board have considered the evidence and issues presented in this appeal. The findings and conclusions set forth above reflect the majority's decision and the affixed signatures attest this is the Board's decision.